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SERVICE DATE – JULY 7, 2006

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-290 (Sub-No. 266X)

NORFOLK SOUTHERN RAILWAY COMPANY–ABANDONMENT EXEMPTION–IN
MCDOWELL COUNTY, NC

Decided: July 5, 2006

Norfolk Southern Railway Company (NSR) filed a notice of exemption under 49 CFR 1152 Subpart F-Exempt Abandonments to abandon approximately 3.5 miles of railroad between milepost SB 205.0 and milepost SB 208.5, near Marion, in McDowell County, NC. On May 22, 2006, the City of Marion, NC (City), filed a request for the issuance of a notice of interim trail use (NITU) and for a public use condition. Notice of the exemption was served and published in the Federal Register on June 8, 2006 (71 FR 33334). The exemption is scheduled to become effective on July 8, 2006.

The Board's Section of Environmental Analysis (SEA) issued an environmental assessment (EA) in this proceeding which was served on June 13, 2006. In the EA, SEA indicated that the U.S. Environmental Protection Agency commented that the proposed abandonment would not likely result in impacts to water quality under section 402 of the Clean Water Act, but deferred final consultation to the North Carolina Department of Environment and Natural Resources (NCDENR). SEA states that, according to NCDENR, the State has jurisdiction over two of the three unnamed tributaries to Youngs Fork which, based on NCDENR's field survey, could adversely be impacted from salvage activities, particularly bridge demolition. As a control measure, NCDENR requests that NSR adhere to the U.S. Army Corps of Engineers' guidelines for bridge demolition. NCDENR further requests that sediment and erosion control measures be in place prior to commencement of salvage operations and, upon completion of salvage activities, that all disturbed areas be stabilized to prevent sediment from entering surface waters. Accordingly, SEA recommends the following conditions: (1) prior to commencement of any salvage activities, NSR shall consult with NCDENR to ensure that any concerns regarding applicable stormwater management and sediment control requirements are addressed; NSR shall report the results of its consultations in writing to SEA prior to the onset of salvage operations; and (2) to ensure appropriate consideration of the requirements of the National Pollutant Discharge Elimination System (NPDES), NSR shall consult with NCDENR prior to commencement of any salvage activities and shall comply with the reasonable NPDES requirements.

SEA also stated that the National Geodetic Survey (NGS) commented that 16 geodetic survey markers may be located within the area proposed for abandonment. Accordingly, SEA

recommends a condition requiring NSR to coordinate with NGS at least 90 days prior to commencement of any salvage activities.

Finally, SEA stated that the North Carolina Department of Cultural Resources (SHPO) commented that no historic properties listed in or eligible for inclusion in the National Register of Historic Places would be affected by the proposed abandonment. However, SEA recommends a condition that, in the event that any archaeological sites, human remains, funerary items or associated artifacts are discovered during NSR's salvage activities, NSR shall immediately cease all work and notify SEA, interested Federally recognized tribes, and the SHPO. SEA shall then consult with the SHPO, interested Federally recognized tribes, and NSR to determine whether any mitigation measures are necessary.

Comments to the EA were due by June 28, 2006. No comments were filed. Accordingly, the conditions recommended by SEA in the EA will be imposed.

As stated, the City filed a request for the issuance of a notice of interim trail use (NITU) for the line under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), and for a public use condition under 49 U.S.C. 10905,¹ in order to negotiate with NSR for acquisition of the right-of-way for use as a recreational trail. The City requests that NSR be prohibited from disposing of the corridor, other than the tracks, ties, and signal equipment, except for public use on reasonable terms, and that NSR be barred from removing or destroying any potential trail-related structures, such as bridges, trestles, culverts and tunnels, for a 180-day period from the effective date of the abandonment exemption. The City states that the corridor would connect public recreation areas, a public school, and nearby neighborhoods to the downtown business district in Marion, and that the corridor provides important wildlife habitat and open space. The City indicates that the 180-day period is needed to begin negotiations with NSR.

The City also submitted a statement of willingness to assume financial responsibility for the management of, for any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for payment of any and all taxes that may be levied or assessed against, the right-of-way, as required at 49 CFR 1152.29, and acknowledged that the use of the right-of-way for trail purposes is subject to possible future reactivation for rail service. NSR has indicated its willingness to negotiate with the City for interim trail use.

Because the City's request complies with the requirements of 49 CFR 1152.29 and NSR is willing to negotiate for trail use, a NITU will be issued. The parties may negotiate an agreement during the 180-day period prescribed below. If the parties reach a mutually acceptable final agreement, no further Board action is necessary. If no agreement is reached within 180 days, NSR may fully abandon the line. See 49 CFR 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to restoration for railroad purposes.

¹ The EA indicated that the right-of-way may be suitable for other public use following abandonment.

As an alternative to interim trail use under the Trails Act, the right-of-way may be acquired for public use as a trail under 49 U.S.C. 10905. See Rail Abandonments—Use of Rights-of-Way As Trails, 2 I.C.C.2d 591, 609 (1986). Under section 10905, the Board may prohibit the disposal of rail properties that are proposed to be abandoned and are appropriate for public purposes for a period of not more than 180 days after the effective date of the decision approving or exempting the abandonment. To justify a public use condition, a party must set forth: (i) the condition sought; (ii) the public importance of the condition; (iii) the period of time for which the condition would be effective; and (iv) justification for the imposition of the period of time requested. See 49 CFR 1152.28(a)(2). Because the City has satisfied these requirements, a 180-day public use condition will be imposed, commencing from the July 8, 2006 effective date of the exemption.

When the need for interim trail use/rail banking and public use is shown, it is the Board's policy to impose both conditions concurrently, subject to the execution of a trail use agreement. If a trail use agreement is reached on a portion of the right-of-way, NSR must keep the remaining right-of-way intact for the remainder of the 180-day period to permit public use negotiations. Also, a public use condition is not imposed for the benefit of any one potential purchaser, but rather to provide an opportunity for any interested person to acquire the right-of-way that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, NSR is not required to deal exclusively with the City, but may engage in negotiations with other interested persons.

As conditioned, this decision and notice will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is reopened.
2. Upon reconsideration, the notice served and published in the Federal Register on June 8, 2006, exempting the abandonment of the line described above is modified to the extent necessary to implement interim trail use/rail banking and to permit public use negotiations as set forth below, for a period of 180 days commencing from the July 8, 2006 effective date of the exemption (until January 4, 2007), and subject to the following conditions: (1) prior to commencement of any salvage activities, NSR shall consult with NCDENR to ensure that any concerns regarding applicable stormwater management and sediment control requirements are addressed; NSR shall report the results of its consultations in writing to SEA prior to the onset of salvage operations; (2) to ensure appropriate consideration of NPDES requirements, NSR shall consult with NCDENR prior to commencement of any salvage activities and shall comply with the reasonable NPDES requirements; (3) NSR shall notify NGS at least 90 days prior to commencement of any salvage activities in order to plan for the possible relocation by NGS of geodetic station markers; and (4) in the event that any archaeological sites, human remains, funerary items or associated artifacts are discovered during NSR's salvage activities, NSR shall

immediately cease all work and notify SEA, interested Federally recognized tribes, and the SHPO. SEA shall then consult with the SHPO, interested Federally recognized tribes, and NSR to determine whether any mitigation measures are necessary.

3. Consistent with the public use and interim trail/rail banking conditions imposed in this decision and notice, NSR may discontinue service and salvage track and related materials. NSR shall otherwise keep intact the right-of-way underlying the tracks, including bridges, trestles, culverts, and tunnels, for a period of 180 days to enable any state or local government agency, or other interested person to negotiate the acquisition of the line for public use. If an interim trail use/rail banking agreement is executed before expiration of the 180-day period specified above, the public use condition will expire to the extent the trail use/rail banking agreement covers the same line.

4. If an interim trail use/rail banking agreement is reached, it must require the trail user to assume for the term of the agreement, full responsibility for management of, for any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for the payment of any and all taxes that may be levied or assessed against, the right-of-way.

5. Interim trail use/rail banking is subject to the future restoration of rail service and to the user's continuing to meet the financial obligations for the right-of-way.

6. If interim trail use is implemented, and subsequently the user intends to terminate trail use, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.

7. If an agreement for interim trail use/rail banking is reached by January 4, 2007, interim trail use may be implemented. If no agreement is reached by that time, NSR may fully abandon the line.

8. This decision and notice is effective on its date of service.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams
Secretary